No. 9133

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN (a corporation),

Appellants,

vs.

PALO VERDE IRRIGATION DISTRICT, an Irrigation District,

Appellee.

APPELLANTS' CLOSING BRIEF.

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APPELLANTS' CLOSING BRIEF.

In this brief the appellants will limit themselves to replying to the appellee's brief. It will be impossible, however, to reply in a limited brief of twenty pages to all of the argument and statement of the appellee, and appellants will therefore have to rely largely upon their opening brief and upon the record itself. Appellants will not attempt to correct exaggerated statements of facts or statements of facts which do not appear in the record. Appellants have in their opening brief limited their statement to the printed record before the Court which is acknowledged to be a full and complete record, such acknowledgment

appearing in the record itself. The appellee, however, has gone beyond this record. One example of this is the exhibit set forth and attached to appellee's brief. This exhibit, while a part of the record in the lower Court, has been carefully summarized in the transcript agreeable to stipulation and order. Appellants cannot accept the statement of the case or statement of facts in appellee's brief except so far as it conforms to the actual record on this appeal.

PRELIMINARY STATEMENT.

Appeals are now pending before this Court in the bankruptcy cases of *Lindsay-Strathmore, Merced, Corcoran,* and *James* cases in addition to the instant case. The *Lindsay* case is on the calendar for argument the same time as the *Palo Verde* case, and presumably these two cases will be decided simultaneously. The *Merced* case is perhaps the most important of the cases tried in the lower Court. The record in that case is now complete and briefs are in course of preparation. That case will be ready for submission about the middle of November. The *Corcoran* appeal has now been docketed in this Court and the *James* case will shortly be docketed. This group of cases therefore are of great importance, because they are the first group of cases to come before this Appellate Court for review after the decision in the *Bekins* case upholding the constitutionality of Chapter IX. Furthermore, several cases are pending in the District Court of which quite a number have

already been tried and are now being briefed, and in one case at least, *Waterford,* the Court is awaiting the decision of this Court in these cases now on appeal.

The decision of this Court therefore will determine to a great extent the future credit, growth and welfare, not only of California irrigated valleys but of the entire state.

THE ECONOMIC BACKGROUND.

There has been a tremendous conflict going on in California of which these cases are the battleground. This conflict is between the bondholders with the senior or superior claim and a second group who have contributed to California's development by lending money on mortgages, on land and improvements in these irrigation districts. The contributions of the first group, the bondholders, and of the second group, have improved the conditions of the third group, the people of the district.

The first group has invested about one hundred million dollars in the general obligations of municipal bonds of irrigation districts, and has been given what is in effect a first claim upon all lands within the districts.

Time and again the Supreme Court of California and the Supreme Court of the United States have determined the nature and validity of the contract represented by these bonds, and irrepealable unlimited ad valorem taxes or assessments must be levied an-

nually to pay both principal and interest to service them. They have been held not to be secondary to state and county taxes. Their legal status is firmly established and the safeguards and remedies protecting other California municipal bonds are no better or stronger.

About one hundred districts voted and sold under stringent state supervision and control about one hundred million dollars worth of these bonds to finance the construction and acquisition of valuable water and property rights and to build thousands of miles of canals, drainage ditches, levies, and related permanent improvements. This investment has made all other developments in California's interior valleys possible. Without irrigation there would be little need for school houses, there would be small and uncertain crops, and no possibility of or permanent foundation for large cites. Prior to irrigation the land had a purely nominal or speculative value. In 1928 the same property was estimated by the California Irrigation Districts Association to be worth one billion dollars.

A certificate bearing the Great Seal of the State is affixed to each irrigation district bond, irrevocably declaring it a lawful investment for savings banks, insurance companies, and trustees, and eligible to secure deposits of state, county, and city funds. These are the only bonds ever issued in California so certified by the state.

Virtually all land reclamation improvements achieved in California during the past twenty-five

or more years has been with money loaned by these bondholders. These districts include about 4,000,000 acres, most of which are improved with orchards, dairies, and vegetable gardens and other farms. There are included in these districts the richest and most desirable country real estate in California. Districts such as Imperial and Merced include virtually entire counties. There are scores of cities, schools, road and other taxing districts inside the boundaries of irrigation districts, whose prosperity depends upon the success of the irrigation districts, and none of whose bonds rank ahead of the irrigation bonds.

These irrigation district bonds were distributed by the largest banks and bond houses with the recommendation of the State attached to each bond, and were purchased by savings banks, life insurance companies, trust funds, and by thousands of school teachers, doctors, and small business men. Many of them have been in terrible distress because on the strength of the State endorsement on the bonds they invested their life's savings in them.

These districts are held by the Supreme Court of California to be state agencies, and the property owned by these districts, no matter how acquired, is held to be exempt from taxation.

The second group which has invested money in irrigation districts consists of other banks, life insurance companies and private lenders who have advanced moneys secured by mortgages to individual farm or land owners.

The serious effect this situation has had upon some lending institutions is shown by a letter dated August 10, 1933, written by the President of the Pacific Coast Joint Stock Land Bank, in which he states that the total number of loans of that bank was 1896 representing an unpaid principal amount of mortgages of over fourteen million dollars. Out of this amount 52.24 per cent were in irrigation and reclamation districts.

It is a safe estimate that one-third of all the country real estate mortgage loans during the past twenty-five years in California are on land within these districts, and all of such mortgages are of course wholly junior to the tax secured bonds of the district.

Undoubtedly for the past several years the owners of lands in many districts have had a difficult time to meet their taxes and also to pay interest on their mortgages. Many irrigation district bonds as a consequence defaulted and the salability of the bonds suffered greatly. Under the irrigation district laws the bonds are a general obligation and every acre of the land is liable until all the bonds are fully paid. This has resulted in pyramiding of taxes, until, as has been shown in the *Palo Verde* case, practically 99 per cent of the land is now state owned.

It is a well known fact, a fact of which we think the Court can take judicial notice, that in many of these districts, large financial institutions with heavy mortgage loans, during the periods from 1932 to 1936, engaged in a program of quietly buying up many of these irrigation district bonds. This may not have

been as true a factor in Palo Verde as in other districts.

The fall in the price of bonds caused by the non-payment of taxes and consequent default in payment of principal and interest has been accelerated by a definite campaign to depreciate the value of district bonds by holders of farm mortgages in the districts. An inquiry about irrigation district bonds in practically any bank will bring the statement that they have little merit or value and that it is doubtful if they will ever be paid. In other words, there has been a widespread campaign to depreciate the value of these public bonds.

On the other hand it is to be noted that bonds of counties and cities and school districts and other bonds of taxing agencies have not been so attacked. It is a very odd thing to note that there has been no attempt to repudiate school bonds, and even in the *Palo Verde* case the bonds of these other taxing agencies, except the City of Blythe, are being paid in full while the bonds of the Palo Verde agencies against the same territory have for nearly 10 years been totally in default. There must be a reason for this, and the reason is that irrigation bondholders at the present time are the victims of a purge. In the case of school bonds the opposition from educators would be too great for the mortgage holding group to undertake any such propaganda.

The conflict between mortgage holders and bondholders has not been so apparent in the *Palo Verde* case as it has been in other cases, but the undersigned

counsel appears in four other cases now on appeal in this Court, and we take the opportunity here to present this background to the Court. It is apparent, as we have stated, and as the record shows, that bonds of other taxing agencies are being paid in full, whereas the irrigation bonds have been singled out for special treatment.

This further is apparent, that what the bondholder will lose in the *Palo Verde* case, the mortgage holder and the landholder will gain. A reorganization plan may not be approved as fair and equitable over the objection of a single creditor if it diverts to stockholders any assets which, because of the insolvency, belong solely to creditors. (*In re Philadelphia & Redding Coal & Iron Co.,* 105 Fed. (2d) 357.) It is our solemn contention that this gain of the mortgage holder and land holder, at the expense of the bondholder, is a violation of the principles of the *Boyd* case and that when there is little prospect of rehabilitating the landholder or where that rehabilitation can only be at the expense of the bondholder it should not occur;—rather the district should in good faith perform its duties as trustee for the bondholder and operate the property of this great valley as the trust which it is, and for the use and benefit of the bondholders and the state. The appellee has stated that these bondholders had their opportunity to take the land at one time. We desire to bring sharply to the attention of the Court the fact that appellants were not parties to the Florence Clark lease and option, and that the appellants in this case have never been

under any obligation or in any relation of duty under which they were called upon nor could be called upon to operate the property of the district or take its land. That is and always has been the duty of the officers of the district.

It cannot be denied that the Palo Verde valley has suffered. These difficulties were, not so much, although partly, the effect of the depression, as they have been the effect of floods before the Colorado River dam was built. Appellants declare that there has been and is a solemn duty, not only on the part of the counties within which this district mainly lies, but on the part of the State of California and perhaps more particularly on the part of the United States Government. It has long been a recognized fact that flood control is a federal duty. It certainly has been a duty which the Federal Government has recognized and repeatedly undertaken. It was because of this duty that the Palo Verde matter was presented to the Congress of the United States by a committee headed by Dr. Elwood Mead. The irrigation district endeavored to get federal aid for the district. (Tr. p. 194.) The bill was never passed by Congress, however. A committee also went to Sacramento and met with Mr. Meek, the Director of Public Works, and the State Engineer, and made a report to the Secretary of the Interior regarding the valley. (Tr. p. 195). But these pleas from the stricken valley went unheeded both by Congress and the State. It is now proposed that in fulfillment of these obligations the Federal Government should generously loan $1,000,-

000 to the valley at 4% interest (which is exceedingly good interest in these difficult times), and that the bondholders should make all the contribution.

The duty on the part of the Federal Government in the matter of overflow and flood has long been recognized in our history. Statutory expression of the duty on the part of the state is recognized by the Arkansas Act of September 28, 1850, Title 43, Sec. 982, U. S. C., wherein Congress granted to the several states the swamp and overflow land to enable the states to construct levies and drains and to use the proceeds for that purpose. This it has been held, implies a duty to drain the land. *In re Crawford Levy & Drainage District,* 294 U. S. 598. In the case of *Los Angeles v. Pacific Coast Steamship Company,* 45 Cal. App. 15, it was held:

> "the city took title to such land in its governmental capacity for the purpose of administering the trust imposed by the federal government".

All of the irrigation districts in California, except the Palo Verde District, have been formed under the general irrigation district law, and it has been brought to the attention of the Court that this district exists under a separate act. Its duties and functions, however, are largely the same. The appellee does point out one minor difference in that Section 52 of the General Law provides for payment out of the trust funds in the order of presentation. There is no such comparable provision in the Palo Verde Act. But what we are particularly concerned with here is to point out that these districts are

merely agencies performing the duty of and for the state in draining and irrigating the land, and more particularly are they performing the duty of and for the state and the national government in flood control.

In the case of *People v. Sacramento Drainage District,* 155 Cal. 373, 381, 385, it was said:

> "the state could accomplish this very work without organizing the district as such at all, and without giving the landowners within the district any voice in the selection of the managers or trustees. * * * In fact historically, such was the original method adopted * * *." (Referring to 23 Hen. VIII, Chap. 5, Par. 1, (1531).)

Therefore, it always has been the duty of the National and State Governments to protect the people of the Palo Verde valley, in a general way and out of general funds, from the ravages of flood and from lack of drainage. We do maintain that to force through the plan of composition in this case by strained construction, by disregarding the plain import of words, by what amounts to a revival of legal fictions, and by almost summary Court procedure (the hearing did not last over an hour) without any investigation by or through the Court other than the reception of evidence offered by the petitioner, is to shield the failure to give just relief behind a disregard of constitutional and legal and equitable principles which ought not to be permitted by our Courts of review. It does not seem necessary to the protection of this district to so destroy the fine web of legal and logical processes of thought.

Before closing this introductory statement we wish to say that we have deemed it necessary to review the background of these cases not only on account of this case but of others before this Court under Chapter IX.

We desire to point out one further respect in which it is the duty of the state to relieve property from burdensome assessments and to discharge just obligations which those assessments recognize.

In the case of *Hopkins Federal Savings and Loan Association v. Cleary,* 56 Sup. Ct. Rep. 235, Mr. Justice Cardozo speaking for the Court said:

> "* * * there is thus the duty of the parens patriae to keep faith with those who have put their trust in the parental power".

In the case of *Williamsburg Savings Bank v. State,* 153 N. E. 58 (New York, 1926—Cardozo concurring) the Court said:

> "It was in essence, if not in legal technicality, a state project; and that the state was in right and justice obligated and bound to make sure that the securities issued by the state officers to provide funds for carrying out the project would be paid, even though technically the state was not primarily liable therefor."
>
> "Fortunately, and creditably to them, our courts have firmly established the proposition that the state, as well as an individual, may be honorable and may voluntarily recognize just obligations which it fairly and honestly ought to pay, even though they do not constitute purely legal claims * * *."

If public interest requires, resort should be had to the taxing power so that the burden of relief afforded in the public interest may be borne by the public. *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 602; *County of Los Angeles v. Jones,* 6 Cal. (2d) 695; *County of San Diego v. Hammond,* 6 Cal. (2d) 709; *City of Crescent City v. Moran,* 92 C. A. D. 458.

In the *Hammond* case a resolution of the Board of Supervisors:

> "* * * and that the general county interest will be served and promoted by the expenditure of county funds for the refunding and adjustment of the outstanding bonded indebtedness of said district * * *."

was approved, the Court also saying:

> "Under such circumstances can it be doubted that the main purpose of the appropriation is public in nature?"

And referring to irrigation districts within the county, said:

> "We cannot say as a matter of fact or as a matter of law that the board of supervisors may not in some legal and equitable manner secure the restoration of said lands within irrigation districts to the tax rolls of the county through the refunding proceedings now pending before the board."[1]

Appellants will next consider appellee's argument, adopting the same order as appellee.

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1. It is to be noted that the refunding proceedings referred to were entirely and 100% voluntary. See case of *County of Los Angeles v. Rockhold,* 3 Cal. (2d) 192.

A. APPELLANTS ARE ENTITLED TO URGE ALL OF THEIR FOURTEEN POINTS.

The rule is stated at 3 C. J. 696, as follows:

> "* * * the general rule in such cases being that if a defendant in the trial court, by failure to plead, to request instructions or introduce evidence, to object to instructions or evidence, or otherwise, fails to present a defense which he might make, and submits issues not involving it, he will be bound in the appellate court by the case made by the pleadings and evidence as exhibited by the record, * * *"

The mistake that appellee makes *is in that the appellee* cannot for the first time on appeal object that the answer is defective in its statement of any defense or that it is otherwise insufficient. In *Campbell v. U. S.*, 224 U. S. 99, 32 Sup. Ct. 398, the Court said:

> "The power of that court was limited to a consideration of such questions of law as may have been presented by the record proper, * * *"
>
> "If the answer did not put in issue the allegation of the complaint respecting the default of the principal in the bond, this claim is well founded, otherwise it is not."

Saying further:

> "But of this it is enough to say that no such objection was raised in the District Court, but, on the contrary, the answer was treated as sufficient in that respect. This being so, the plaintiff was not at liberty to raise the objection in an appellate court. Had it been made seasonably it could, and doubtless would, have been avoided by an amendment."

Rusch v. Kansas City First National Bank, 71 Fed. 102, where the Court said:

> "We need not stop, however, to consider the latter contention; for, even if it be true that the second counterclaim did state a cause of action different from that alleged in the first answer, still the question now argued was not raised by the demurrer, and is not available in this court. Even if the plaintiff was privileged to demur to the amended answer on the ground that it was a departure from the original pleading, it did not do so. The point that there was a departure is raised for the first time in this court, and for that reason it cannot be noticed."

Smith and Davis Manufacturing Company v. Mellon, 58 Fed. 2705, where the Court said:

> "While this defense may not have been pleaded with technical accuracy, yet the testimony tending to establish it was received on the final hearing without objection. The first time the question has been raised it appears from the record is on the argument of the appeal in this court; here it is too late."

Also the question of jurisdiction of the subject matter may be raised for the first time in the Appellate Court. *Chapman v. Barney,* 129 U. S. 677, 9 Sup. Ct. 426; *Cameron v. Hodges,* 127 U. S. 322, 8 Sup. Ct. 1154.

This appeal is a trial de novo. *Hopkins v. Texas Co.* (C. C. A. 10), 62 Fed. (2d) 691; *Boynton v. Moffat Tunnel Impr. Dist.,* 57 Fed. (2d) 772. Writ of certiorari denied, 287 U. S. 620, 53 Sup. Ct. 20.

The only question therefore is, were these fourteen defenses raised by the appellants.

Chapter IX provides that any creditor affected by the plan may file an answer controverting any of the material allegations and setting up any objection he may have to the plan. (Section 83 (b).) This provision does not seem even to require that objections other than denials and *objections to the plan* need be set forth; so it goes on to provide that the Court (Subsection d) may not confirm the plan until it has been accepted in writing by two-thirds of the creditors. And subdivision (e) provides that at the conclusion of the hearing the Court shall enter a decree, *if satisfied;*—that the plan is fair; that it complies with the provisions of the chapter, that it has been properly accepted; that all amounts paid by petitioner are reasonable; that the plan is in good faith; and that the petitioner is authorized by law to take all action necessary to carry it out.

It would therefore seem that there is no requirement on the behalf of any creditor to bring any of these matters to the attention of the Court. The Court is required to make these special findings.

However, the appellants *did* raise each and every one of their points in their answer (Tr. p. 57) and no objection was made by the appellee to the sufficiency of the pleadings. It is therefore too late for the appellee to raise any such question in relation thereto on this appeal.

Furthermore, the record is full of objections to the introduction of testimony of motions, stipulations, evidence and of argument on points affecting these various defenses. The appellants even brought some of the matters to the attention of the Court by means of their disapproval and objections to the findings. (Tr. p. 124.) The narrative statement of evidence shows (Tr. p. 147) that the cause came on for hearing upon the petition and the *answer* and *objections* of the appellants. The minute order of the Court (Tr. p. 91) shows that the "objections" heretofore filed by the appellants were overruled. Since the three objections which appellants made to the introduction of evidence at the opening of the hearing were oral objections the Court could only have referred to the *written* objections which were filed by the appellants, and which are set forth at transcript page 57. The stipulation of the parties (Tr. p. 46) shows that the transcript of the evidence was to be introduced in evidence not only with the evidence but objections and rulings thereon. An example of an objection to testimony is shown at transcript page 265. Respondents objected to the introduction of Petitioner's Exhibit 29 purporting to show unpaid principal and interest. This objection was made upon the theory that the district has been in fact refinanced. (Fourth Proposition.) A written stipulation (Respondents' Exhibit I, Tr. pp. 295 to 307) was introduced into evidence. This stipulation covered evidence on many points which have been urged by the appellants.

Much other testimony by way of written documents, cross-examinations and stipulations was also introduced by the appellants on their theory of the case.[2]

B. APPELLANTS' FOURTEEN POINTS.

In the few allotted pages which remain it will be impossible to discuss or reply to the arguments of the appellee upon each of the fourteen points, and appellants will have therefore merely to make brief comments upon some of the fourteen points presenting the same in numerical order as set forth in the opening brief and in appellee's brief. At the outset we wish to state that it will be impossible to correct statements of fact. We do not, however, accept appellee's interpretation of the fact of the case and respectfully request the Court to read the important parts of the not too lengthy transcript on appeal which we have referred to at page 2 of our opening brief.

FIRST PROPOSITION: BY THE TERMS OF THE STATUTE THE COURT WAS WITHOUT JURISDICTION.

This matter is discussed rather thoroughly in appellants' reply brief in the *Lindsay-Strathmore Irrigation District* case which appellants understand will be argued at the same time as this case and we pray that the Court will refer at least to the reply brief in that case under this same heading.

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2. The reporter's transcript of the proceedings of July 18. 1938, is on file in this Court although not a part of the printed record on appeal. If it should not be deemed that appellants have shown otherwise that all their points were raised below the reporter's transcript sufficiently showed this.

SECOND PROPOSITION: THERE IS ANOTHER ACTION PENDING IN THE STATE COURTS OF CALIFORNIA UPON THE SAME IDENTICAL CAUSE, ETC.

Appellants frankly admit that in their opinion California Stat. 1937, Chapter 24, is unconstitutional, but when one of the undersigned counsel presented that contention to the Supreme Court of California before a trial on the merits in the *South San Joaquin* case the Court called attention to Section 5 of the Act, which provides that the filing of the petition shall automatically enjoin and stay the commencement or continuance of suits or proceedings against the district, and providing:

> "The court in which said petition is filed shall have exclusive jurisdiction with respect to all suits, actions and proceedings against the district * * *."

The Court said:

> "The petitioner insists that the court should not deem itself governed by the foregoing statutory stay, for the reason, so it is claimed, that the statute is unconstitutional, and it is urged that this court explore the provisions of the act, declare it unconstitutional, and proceed herein notwithstanding."

Saying also:

> "* * * the Superior Court has jurisdiction in the first instance to pass upon the validity of the act of March 30, 1937 * * *."
>
> *Morris v. South San Joaquin Irrigation District,* 72 Pac. (2d) 154, 9 Cal. (2d) 781.

And we are again reminded of Subsection (i) of Section 83 of the Bankruptcy Act, which provides:

> "Nothing contained in this chapter shall be construed to limit nor to impair the power of any state to control by legislation *or otherwise* any municipality or any political subdivision of or in such state in the exercise of its political or governmental powers including expenditures therefor." (Italics ours.)

THIRD PROPOSITION: THE CAUSE IS RES JUDICATA.

The facts relative to the district's first bankruptcy petition under Section 80 are set forth at and following transcript page 295. At page 298 it is stated that the cause came on before the Court and was tried upon the merits and that on November 8, 1936, Judge Cosgrave entered a judgment of dismissal on the grounds of the unconstitutionality of the Bankruptcy Act, Sections 78-80, and the Palo Verde Irrigation District appealed.

The action of the Circuit Court of Appeals in that regard is set forth in 88 Fed. (2d) 1016, where it was

> "ordered appeal in above cause dismissed for failure of the appellant to file record and docket cause; * * *."

The stipulation on page 296 of the transcript shows that the plan set forth in the petition under Section 80 "provided substantially the same terms as to bondholders as the plan in the instant case".

U. S. C. A. Title 11, Section 303a, Subsection (1), provides:

> "If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter or the application of such provision to other persons or circumstances shall not be affected thereby."

In *Ashton v. Cameron County Water Improvement District,* 298 U. S. 513, Mr. Justice McReynolds in the majority opinion said:

> "The Act has been assailed upon the grounds that it is not in any proper sense a law on the subject of bankruptcy, and therefore it is beyond the power of Congress; * * * we assume for this discussion that the enactment is adequately related to the general 'subject of bankruptcies'."

There can be no question of the bankruptcy Court's jurisdiction in composition. *Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & Pac. R. Co., et al.,* 294 U. S. 648, 79 L. Ed. 1110.

It is appellants' contention that the decree of the District Court entered by Judge Cosgrave on November 8, 1936, is *res adjudicata* of the issues in this case.

Baker v. Cummings, 181 U. S. 117, 21 Sup. Ct. 578, 45 L. Ed. 776 (1901);

Dowell v. Applegate, 152 U. S. 327, 345, 14 Sup. Ct. 611, 38 L. Ed. 463, 470 (1893);

Johannessen v. United States, 255 U. S. 227, 238, 32 Sup. Ct. 613, 56 L. Ed. 1066, 1070 (1911);

Reed v. Allen, 286 U. S. 191, 52 Sup. Ct. 532, 79 L. Ed. 1054 (1932);

United States v. Throckmorton, 98 U. S. 61, 65, 68, 69, 25 L. Ed. 93, 96.

The Courts have almost uniformly held that judgments rendered under unconstitutional acts are nevertheless valid until said judgments have been set aside or reversed. A good illustration of such a case is that of *Woods Bros. Construction Co. v. Yankton County,* 54 Fed. (2d) 304; see also *Phebus v. Search,* 264 Fed. 407; *Cutler v. Huston,* 158 U. S. 423, 15 S. Ct. 868.

As said in the *City of Watertown v. Eastern Dakota Electric Co.,* 296 Fed. 832:

> "* * * overruling a former decision does not reverse the judgment duly rendered in the case overruled, or affect the rights of the parties to that decree. That judgment remains res adjudicata."

See also:

New Orleans v. Citizens' Bank, 167 U. S. 371, 398, 17 Sup. Ct. 905, 914;

Southern Pacific R. R. v. United States, 168 U. S. 1, 49, 18 Sup. Ct. 18, 42 L. Ed. 355;

Postal Telegraph Cable Co. v. Newport, 247 U. S. 464, 38 Sup. Ct. 566, 62 L. Ed. 1215.

In *Stoll v. Gotlieb,* 305 U. S. 165, the United States Supreme Court said:

> "* * * After a Federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact. * * *"

> "* * * It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined."

FOURTH PROPOSITION: RECONSTRUCTION FINANCE CORPORATION IS NOT A CREDITOR AFFECTED BY THE PLAN.

Appellants can merely make some very brief comments and will rely upon their opening brief and the record in the case.

1. The limitation upon the power of the district by the authority given by the election of the people and the approval of the Districts Securities Commission distinctly limits the authority of the Board of Directors in making its contract with the R. F. C.

2. Appellants have the right to raise the question of ultra vires when their rights are affected. Certainly also appellants have the right to contend that the contract should be construed, if possible, within the powers of the district and of the R. F. C.

3. Title 15, Section 604a, provides that no funds shall be disbursed by the R. F. C. on any loan commitment after the expiration of one year from the date of such commitment.

4. The power of the Reconstruction Finance Corporation under Section 403, Title 43, U. S. C., to *purchase* securities is limited by the requirement that it result in a reduction of the district's indebtedness.

FIFTH PROPOSITION: THE PLAN IS ONE FULLY EXECUTED OUT OF COURT, AND NOT PURSUANT TO THE STATUTE.

The enactment of Subdivision (j), Section 83, which as appellee conceives was for the purpose of reversing the *West Palm Beach* case, evidently was not intended to affect the rule of that case *in a situation where securities had not been exchanged.*

PROPOSITIONS SIXTH TO FOURTEENTH:

Further discussion of the propositions here set forth is not possible owing to the length of this brief. The points, however, are covered in the opening brief and we will merely make one or two very brief comments.

1. It has not and cannot be shown that the Mutual Water Company's mortgage bonds were superior to the effect of taxes levied for public purposes upon property within these districts. Appellants' conclusion and contention is that the levy of taxes for district purposes upon the real and personal property would have wiped out the lien of the Water Company bonds. Nothing in the record or which could have been introduced into the record would show any justification for a preference in favor of the holders of those bonds.

2. In the case of *McKaig v. Moutrey,* 90 C. A. D. 335, 90 Pac. (2d) 108, and *River Farms Co. of Calif. v. Gibson,* 4 Cal. App. (2d) 731, 42 Pac. (2d) 95, the Courts of our state have held that the bondholder is the direct beneficiary of the trust funds. In the *McKaig* case the Court said:

"* * * the assessment when so levied, became the property of the district and was held in trust for the bondholders under section 29 of the Irrigation District Act. St. 1909, p. 1075."[3]

CONCLUSION.

Appellants' fourteen points are fully sustained by the record and the law.

How poor the vision into the future is is now more apparent from rapidly rising prices of farm commodities. Who can say how slight a burden irrigation bond debt in California will be even a few years from now.[4]

Appellee states on page 70 "R. F. C. did not purchase its bonds as a part of a speculation by which to make a profit through these composition proceedings". Appellants are glad to have that concession. If the decree be reversed the Reconstruction Finance Corporation can still receive all it loaned. A reversal will not result in disaster or hardship to the district for it is 96% refinanced, nor will other than justice and equity be done these appellants.

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3. Petition for writ of certiorari was filed in the United States Supreme Court August 14, 1939 in the case of *Vallette v. City of Vero Beach*, 104 Fed. (2d) 59, cited by appellee.

4. An item in the Los Angeles "Times", September 9th, is a dispatch from Des Moines, Iowa, September 8th, and reads as follows:

"Federal Judge Chas. A. Dewey today decided to wait and see if the war might not raise prices sufficiently to save an Iowa farmer threatened with foreclosure. The judge turned down a request by the Equitable Life Assurance Society of New York for permission to bring a foreclosure action against Milton Edelman of Lost Nation, Iowa.

'If conditions are to be anything like before, he might rehabilitate himself', commented the judge."

This "tiny residue" of bondholders have not obstructed the plan or its fulfillment. Those bondholders who chose to surrender their bonds at 23¢ will not complain if appellants keep their bonds.

Dated, Turlock, California,
September 22, 1939.

Respectfully submitted,
W. Coburn Cook,
Chas. L. Childers,
Attorneys for Appellants.